

CHEN (Migration) [2020] AATA 3255 (5 August 2020)

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DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Ying-Chu CHEN

CASE NUMBER: 1821754

DIBP REFERENCE(S): BCC2018/1700041

MEMBER: P. Wood

DATE: 5 August 2020

PLACE OF DECISION: Melbourne, Victoria

DECISION: The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

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- Statement made on 5 August 2020 at 9:40am

CATCHWORDS

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• *MIGRATION – Student (Temporary)*

• *(Class TU) visa – Subclass 500 (Student) – false or misleading information in previous visa application – claimed work for an employer for three months – no response to tribunal’s s 359(2) letter – no compelling or compassionate circumstances justifying grant of visa – decision under review affirmed*

LEGISLATION

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• *Migration Act 1958 (Cth), ss 65, 359(2), 359A, 359C, 36(3), 363A*

• *Migration Regulations 1994 (Cth), Schedule 2, cl 500.217(1), Schedule 4, criterion 4020*

CASES

• *Arora v MIBP [2016] FCAFC 35*

• *Batra v MIAC [2013] FCA 274*

• *Hasran v MIAC [2010] FCAFC 40*

• *Huo v Minister for Immigration and Multicultural Affairs [2002] FCA 617*

• *Kaur v MIBP [2017] FCAFC 184*

• *Manna v Minister for Immigration and Citizenship [2012] FMCA 28*

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Plaintiff M64/2015 v MIBP [2015] HCA 50
Singh v MIBP [2018] FCAFC 52
Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Immigration on 11 July 2018 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s.65 of the *Migration Act 1958* (the Act).
4. The applicant applied for the visa on 17 April 2018. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.500.217(1) of Schedule 2 to the Migration Regulations 1994 (the Regulations) because they did not satisfy Public Interest Criterion 4020 ('PIC 4020') and there were no compassionate or compelling circumstances to warrant waiver of this criterion.
5. On 8 July 2020, the Tribunal wrote to the applicant pursuant to s.359(2) of the Act. In the s.359(2) letter, the Tribunal invited the applicant to give the following information in writing:
 6. *Information about whether you gave or caused to be given to the Minister, an officer, the Tribunal during the review of a Part 5-reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth:*
 - a. *a bogus document; or*
 - b. *information that is false or misleading in a material particular in relation to:*
 - i. *the visa application which is the subject of the review; or*
 - ii. *a visa you held in the period of 12 months prior to that application.*
 7. *Information about whether you or a member of your family unit has had a visa refused because of a failure to satisfy PIC 4020.*
 8. *If the Tribunal finds that you have given a bogus document or information that is false or misleading in a material particular, then it will need to consider whether to waive the requirements in PIC 4020(1) and (2), including considering whether certain circumstances exist which justify the grant of the visa. Therefore, please provide information as to whether there are:*
 - a. *compelling circumstances that affect the interests of Australia that justify granting the visa; or*
 - b. *compassionate or compelling circumstances that affect the interests of an Australian citizen, Australian permanent resident or eligible New Zealand citizen that justify granting the visa.*
9. The due date for response to this correspondence was 22 July 2020. At the time of this decision no response to the aforementioned invitation, or request for an extension of time to respond, has been received by the Tribunal. Following careful consideration, the Tribunal is satisfied that its invitation pursuant to s.359(2) of the Act was properly despatched to the address of the applicant which was provided with the application for review.
10. Where an applicant is invited to provide information in accordance with s.359(2) of the Act, or comments on or response to information in accordance with s.359A of the Act, and fails to do so within the prescribed period, the Tribunal may make a decision on the review without taking any further action to obtain the information according to subsection 359C of the Act. In these circumstances, the applicant is not entitled to appear before the Tribunal in accordance with subsection 360(3) of the Act. Of note, the effect of s.363A of the Act is that if an applicant has no entitlement to a hearing, the Tribunal has no power to permit the

applicant to appear before it as outlined by the Full Federal Court of Australia in the matter of *Hasran v MIAC* [2010] FCAFC 40.

11. The Tribunal has carefully considered whether to afford additional time to the applicant to provide a response to the letter of 8 July 2020, or to provide further material in support of his application for review. In doing so, it has paid careful regard to the guidance in the decisions of *Huo v Minister for Immigration and Multicultural Affairs* [2002] FCA 617 and *Manna v Minister for Immigration and Citizenship* [2012] FMCA 28 where the Courts held that the Tribunal is not required to indefinitely defer its decision-making process.
12. The Tribunal has taken into account that the applicant has been aware since 11 July 2018, or soon thereafter, of the reasons for the visa application being refused. The Tribunal has also considered that the implications of not responding to its invitation of 8 July 2020 were set out clearly in its correspondence. In these circumstances, the Tribunal considers that the applicant has had sufficient time in which to address the central issues arising in the application for review and to respond to the letter of 8 July 2020.
13. On balance, the Tribunal considers it appropriate to make its decision on the review without taking any further action to obtain the information, or to obtain the applicant's views on the information, respectively referred to in its letter of 8 July 2020. Accordingly, the Tribunal has determined this application for review following careful consideration of the documentary material before it.
14. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

15. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.500.217(1) for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
16. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver

does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

17. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in the Act. In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
18. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
19. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
20. The Tribunal also notes the guidance concerning these matters from the Full Federal Court of Australia in the matter of *Singh v MIBP* [2018] FCAFC 52. In particular, the Tribunal has paid careful regard to the following guidance in that decision [at 144]:
 21. *"Where an issue of the proper construction or application of PIC 4020 is raised, Trivedi and Patel authoritatively state that where a visa applicant has given or caused to be given to a relevant decision-maker a document which is a "bogus document" as defined, or information that is false or misleading in a material particular as defined, to determine whether PIC 4020 is satisfied or not, it is not necessary to show knowing complicity by the visa applicant as long as the material is purposely untrue."*
22. In this case, the delegate wrote that the applicant, in a different visa application lodged on 21 March 2017, "claimed to have been in paid employment for three months or more with Willow Creek Farming. As part of the assessment, this claim was subject to verification and was raised with the business owner, Willow Creek Farming to quantify these employment claims. The business owner of Willow Creek Farming has confirmed their claims as fraudulent, and advised that their employment records indicated that they had never been employed by or worked on the farm".
23. The Tribunal has carefully examined the documentary evidence before it and finds no persuasive evidence to disturb the Department's conclusion that false and misleading information was provided by the applicant in relation to Willow Creek Farming.
24. Following careful consideration, the Tribunal finds there is probative evidence that the applicant has given to the Minister information that is false and misleading in a material particular, namely that they were employed with Willow Creek Farming. Further, the Tribunal is satisfied that the aforementioned information was purposely untrue and its submission contains an element of deception.

25. Therefore, the Tribunal finds that the applicant does not satisfy PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

26. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
27. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
28. For the following reasons, the Tribunal is not satisfied that the requirements of PIC 4020(1) should be waived. There is no contemporary evidence before the Tribunal that there are compelling circumstances that affect the interests of Australia, or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen, that justify the granting of the Subclass 500 visa to the applicant. Further, the Tribunal notes that it provided the applicant with the opportunity to provide such information in its correspondence of 8 July 2020, but they did not do so.
29. Following careful consideration, the Tribunal finds that the requirements of PIC 4020(1) should not be waived.

DECISION

30. The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

P. Wood
Senior Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

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Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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